IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-738

THE MESCALERO APACHE TRIBE,

Petitioner,

v.

FRANKLIN JONES, COMMISSIONER OF THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO, and THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE, AND BRIEF OF ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC., THE HUALAPAI TRIBE, THE LAGUNA PUEBLO, THE METLAKATLA INDIAN COMMUNITY, THE NAVAJO TRIBE, THE NEZ PERCE TRIBE, THE SAN CARLOS APACHE TRIBE, THE SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY, AND THE SENECA NATION, as AMICI CURIAE, IN SUPPORT OF PETITION FOR CERTIORARI

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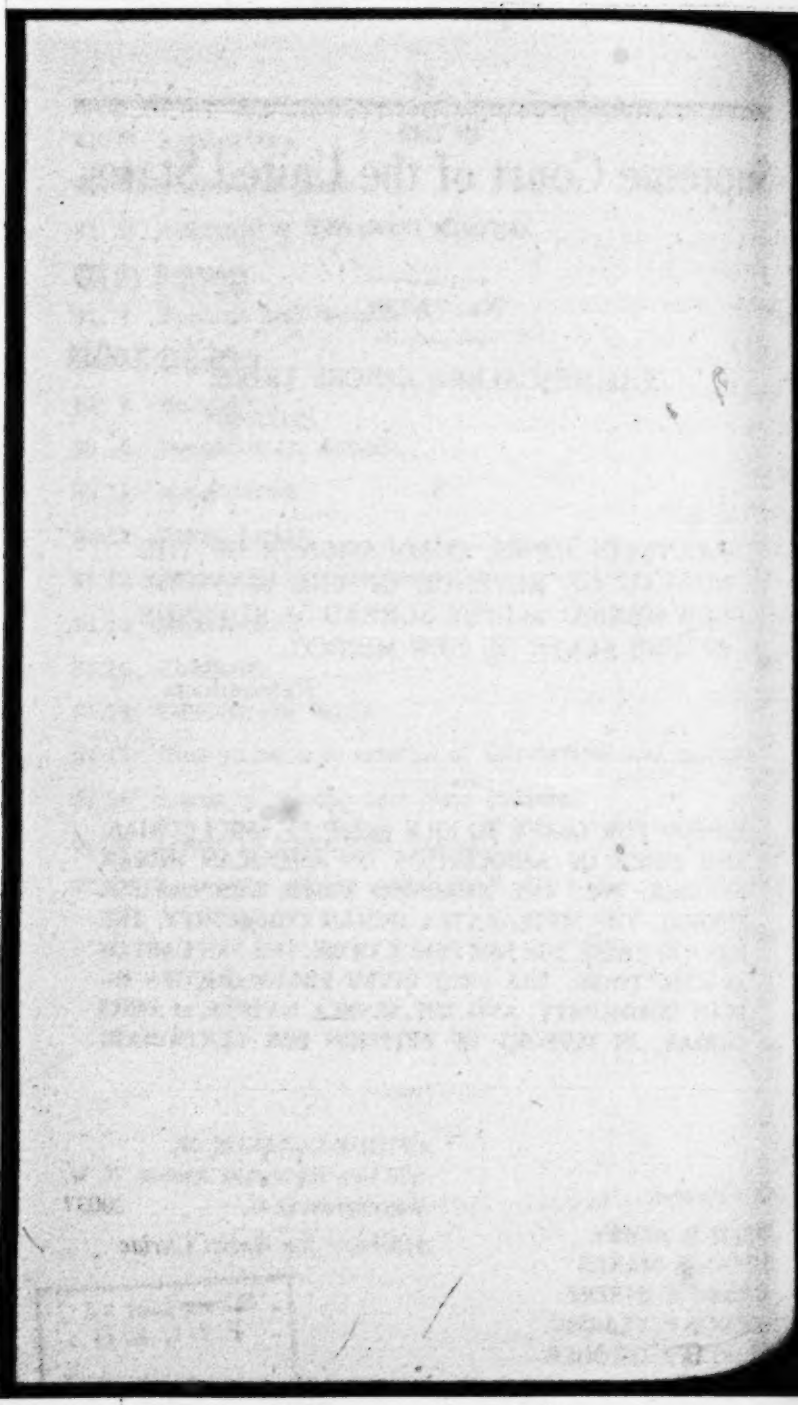
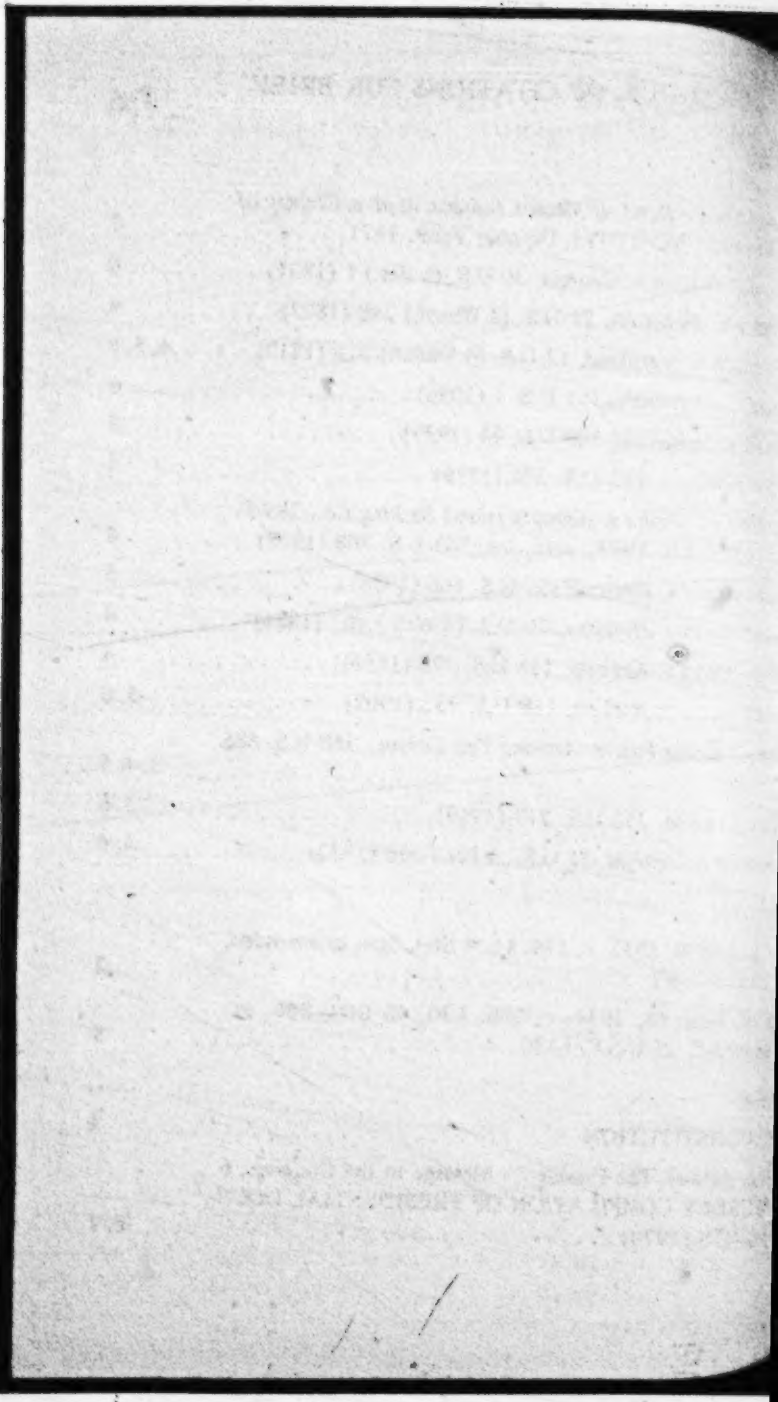


TABLE OF CITATIONS FOR BRIEF



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MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

The Association on American Indian Affairs, Inc., the Hualapai Tribe of Arizona, the Laguna Pueblo of New Mexico, the Metlakatla Indian Community of Alaska, the Navajo Tribe of Arizona and New Mexico, the Nez Perce Tribe of Idaho, the San Carlos Apache Tribe of Arizona, the Salt River Pima-Maricopa Indian Community of Arizona, and the Seneca Nation of Indians in New York respectfully move the Court pursuant to Rule 42(3) for leave to file the attached brief *amici curiae* in support of the petition for certiorari in the above-captioned cased. Petitioner, the Mescalero Apache Tribe, has consented to the filing of this brief; respondents have refused so to consent.

The Association on American Indian Affairs, is a non-profit membership corporation, organized under the laws of the State of New York for the purpose of protecting the rights and improving the welfare of American Indians. The largest Indian-interest organization in the country, the Association's membership of 50,000 is made up of both Indians and non-Indians, and is nationwide in scope. Over the years, the Association frequently has participated in leading cases involving issues of Indian law before the federal and state courts, including the filing of *amicus curiae* briefs with this Court in *Puyallup Tribe v. Department of Game of the State of Washington*, 391 U.S. 392 (1968), in *Warren Trading Post Company v. Arizona State Tax Comm.*, 380 U.S. 685 (1965), and most recently in *Affiliated Ute Citizens of the State of Utah, et al. v. United States, et al.*, No. 1331, October Term, 1970, and *Agua Caliente Band of Mission Indians, et al. v. County of Riverside*, No. 71-83, October Term, 1971.

The Hualapai Tribe, the Laguna Pueblo, the Metlakatla Indian Community, the Navajo Tribe, the Nez Perce Tribe, the San Carlos Apache Tribe, and the Salt River Pima-Maricopa Indian Community are recognized tribes of American Indians which exercise jurisdiction over, and are the beneficial owners of, seven reservations held in trust by the United States.* The Navajo Tribe, with a population in excess of 120,000, is the largest Indian tribe in the country. All of these tribes are affected by the same legal, social and economic problems which face the Mescalero Apache Tribe, and all are seeking with equal vigor to raise the standard of living of their members through local commercial enterprises and resource development.

This case presents a question of great and continuing concern to the Association and to Indians generally—the question of whether a state may impose its taxes and thus its

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*The Seneca Nation, also a recognized tribe, holds title to its three reservations pursuant to federal treaty and statute, and subject to a restriction upon alienation.

law upon activities engaged in by an Indian tribe, with the direct assistance of the federal government, for the social and economic benefits of its members. The parties hereto, of course, are concerned with this issue in only a limited context: *i.e.*, whether particular New Mexico taxes, levied upon particular Mescalero Apache property and functions, validly were collected. The Association and the tribes which have joined in this motion, on the other hand, are interested in demonstrating to the Court that proper resolution of the question here presented will have broad and ever-increasing national significance as Indians throughout the United States undertake tourist, recreational and business operations in accordanee with federally-sponsored self-help programs.

Specifically, the Association and the moving tribes are submitting the attached brief in order to assist the Court in recognizing that the judgment of the Court of Appeals for the State of New Mexico in this case: (1) runs counter to precedents dating back to the earliest days of this nation in which the quasi-sovereign powers of Indian tribes have been respected and enforced; (2) represents yet another manifestation of the continuing effort by state governments, in their search for additional sources of revenue, to whittle away traditional Indian tax exemptions; and (3) if not reversed, will lay the foundation for imposition upon Indian tribes of new state tax burdens of sufficient magnitude to frustrate economic development projects in which the tribes are engaged, or hope to engage, with federal encouragement and support.

Since the foregoing points cover important facets of the decision below which the immediate parties are not likely to

discuss, the Association and the named Indian tribes joining herein request that their motion for leave to file the attached brief as *amici curiae* be granted.

Respectfully submitted,

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INTEREST OF AMICI CURIAE

The interest of the Association on American Indian Affairs, Inc., the Hualapai Tribe of Arizona, the Laguna Pueblo of New Mexico, the Metlakatla Indian Community of Alaska, the Navajo Tribe of Arizona and New Mexico, the Nez Perce Tribe of Idaho, the San Carlos Apache Tribe of Arizona, the Salt River Pima-Maricopa Indian Community of Arizona, and the Seneca Nation of Indians of New York in the question presented by the case at bar is fully set

forth in the attached motion for leave to file this brief as *amici curiae*, and is not here repeated. Stated in summary, the Association and the named Indian tribes are concerned: first, that the sovereign powers of the Mescalero Apache Tribe and, through it, of all recognized tribes of American Indians under the Constitution, laws and treaties of the United States be identified and protected; and second, that the long-standing governmental policy, reflected in countless past precedents, of insulating Indian tribes from state taxation not be infringed, particularly in connection with tribal activities undertaken with federal assistance for the social and economic betterment of tribal members. Finally, *amici curiae* are concerned that, if New Mexico and other states are permitted to levy taxes upon tribal enterprises, both the implementation of Indian self-determination and the achievement of Indian resource development will be seriously impaired.

REASONS FOR GRANTING THE WRIT

Three levels of government continuously compete for the right to regulate Indians, Indian tribes and Indian affairs: the United States, the several states, and the tribes themselves. In the case at bar, these often-conflicting governmental interests are presented in the context of Indian economic development. First, there is the interest of the federal government in supporting the self-help efforts of Indian tribes to achieve financial stability. Second, there is the interest of a state in raising tax revenues from an Indian economic activity as a means to effectuate general state purposes. See also *Agua Caliente Band of Mission Indians, et al. v. County of Riverside*, No. 71-83, October Term, 1971. Third, there is the interest of an Indian tribe in pursuing an available course of economic development which not only will raise the standard of living of tribal members, but also, in fiscal terms, will give meaning to its powers of self-government. Thus, in the instant case, federal and tribal interests are in harmony, while the state interest constitutes a direct challenge to both.

Recently, this Court in *Warren Trading Post v. Arizona Tax Comm.*, 380 U.S. 685 (1965), and *Williams v. Lee*, 358 U.S. 217 (1959), reaffirmed two signal principles of Indian law covering federal-state-tribal relationships. In *Warren*, the Court held, in a unanimous opinion, that state action is impermissible where it would interfere with a federal policy concerning Indian affairs. In *Williams*, a unanimous Court held that state action is impermissible where it would infringe upon a tribal right of local self-government.

Warren, supra, involved the expression through licensing statutes of a federal interest in the regulation of non-Indian traders on the Navajo Reservation. This expression of federal concern was sufficient, the Court ruled, to prevent the state from asserting its interest in Indian trading by taxing the gross income of the non-Indian trader. The Court in *Warren* did not find any express federal prohibition of state taxation of traders, and left open the manner in which, and degree to which, beyond a direct prohibition, the federal interest in a particular aspect of Indian affairs must be shown to render state taxation impermissible. This case seeks an amplification of the *Warren* holding.

Williams, supra, involved the attempt of a non-Indian to invoke the civil jurisdiction of a state court over a transaction with an Indian which had occurred on an Indian reservation. The Court there felt that the involvement of a non-Indian was not sufficient to defeat application of tribal legal procedures, and held the state action impermissible even where it interfered only to a minor degree with the exercise of tribal self-government powers on the reservation. The Court, of course, did not decide whether state action which interferes to a major degree with the performance of tribal functions outside reservation boundaries is impermissible, and this case also presents that issue.

The questions in this case do not involve whether the federal government has the legal right to prevent application of state laws with respect to Indian economic development.

The federal government's paramount power over Indians and Indian affairs is founded upon the Constitution [U.S. CONST. Art I, §8, cl. 3; Art. II, §2, cl. 2; *Worcester v. Georgia*, 31 U.S. (6 Pet.) 350, 379 (1832)]; upon the fiduciary relationship between the federal government and Indian tribes [*United States v. Kagama*, 118 U.S. 375, 383 (1886)]; and upon the nature of the federal government's relationship to Indian land. *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 240, 259, 261 (1823).

Nor does this case involve the territorial scope of the federal government's paramount power. Since the federal power finds its source not only in the trust relationship of the federal government to Indian land, but also in the Constitution and treaties of the United States, this Court long has recognized that the exercise of the power is not restricted to property or activities within the boundaries of a reservation. *Warren, supra*, at 692, n. 18; *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 417-18 (1866).

Rather, the questions presented here are whether there is an interest of the federal government in Indian economic development sufficient to preclude implementation of a particular state interest in the same subject, and whether the territorial scope of an Indian tribe's self-governmental powers is limited absolutely to tribal activity within the boundaries of a reservation. The decisions of the Court on related questions support the proposition, here pressed by the Petitioner, and endorsed by *amici curiae*, that the interest of the State of New Mexico in taxing Indian economic development must give way to the interests of the federal government and of the tribe in fostering such activity, even where the enterprise lies outside reservation land.

In a landmark 1819 decision, which did not involve federal power over Indian affairs, the Court first fashioned the Supremacy Clause [U.S. CONST. Art. VI, cl. 2] principle that the states have no power, by taxation or otherwise, to retard, impede, or burden the means used by the federal government to carry out powers committed to that government by the Constitution. *McCulloch v. Maryland*, 17 U.S.

(4 Wheat.) 316, 436 (1819). While the Court has restricted the decision in McCulloch over the intervening century and one-half [see, *e.g., United States v. Detroit,* 355 U.S. 466 (1958)], it has never retreated from the principle that

> "... the authority of state laws or their administration may not interfere with the carrying out of a national purpose. Where enforcement of the state law would handicap efforts to carry out the plans of the United States, the state enactment must, of course, give way."

Stewart v. Sadrakula, 309 U.S. 94, 103-4 (1939).

This Court applied the principle fashioned in *McCulloch* to the power of the federal government over Indian affairs in *United States v. Rickert,* 188 U.S. 432 (1902. The question in *Rickert* was whether a county of the State of South Dakota could tax improvements and personal property of individual Indians. No direct federal prohibition of such state action existed, nor was there any comprehensive federal scheme of regulation with respect to personal property and improvements such as the scheme of trader regulation involved in *Warren, supra.* Nonetheless, the Court found that local taxation of Indian personal property was impermissible since it might frustrate the federal purpose to improve the economic lot of the Indian allottee. 188 U.S. at 443.

There is today a clear national policy being pursued by the federal government to improve the economic status of Indian tribes through federally assisted self-help. A key mechanism for carrying out that national policy is the revolving loan fund [25 U.S.C. §470], a major source of capital used by the Mescalero Apache Tribe to finance the ski resort involved in this case. Furthermore, the executive branch of the government enjoys a broad Congressional delegation of authority in the management of Indian affairs [25 U.S.C. §2], and the President has issued a mandate to the Administration actively to support with money and other resources the economic development of Indian tribes. *Indian*

Affairs, The President's Message to the Congress, 6 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 894, 900-01 (1970). These expressions of federal interest in Indian economic development, and the employment of federal resources by the Mescalero Apache Tribe in establishing its off-reservation commercial enterprise, dictate that the tax powers of the State of New Mexico must give way.*

Application of the state revenue laws to Petitioner's activities also would infringe upon the sovereign rights of the Mescalero Apache Tribe. *Williams, supra*, reaffirmed the principle of tribal self-government first fashioned by the Court in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), and later characterized by the Court as an inherent right of the tribes in *Talton v. Mayes*, 163 U.S. 376 (1896). The court below found no impairment of the right of tribal self-government through imposition of a state tax, since it felt that this right is one which exists only within the confines of reservation boundaries. The New Mexico Court thus overlooked the principle that Indian tribes are in some senses sovereign [*Worcester v. Georgia, supra*] and in some senses federal instrumentalities [*United States v. Rickert, supra*], and in both senses should be immune from state taxation regardless of the locus of their operations. See *Territory of Alaska v. Annette Island Packing Co.*, 289 F. 671 (9th Cir. 1923), *cert. den.* 263 U.S. 708 (1923). The court below further paid no heed to the fact that the power to tax is the power to destroy [*McCulloch v. Maryland, supra*], and that the potential for state appropriation of tribal property used in economic development activities involves the same infringement upon the functions of Indian self-government no matter where the tribal property is located.

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*Cf. *Squire v. Capoeman*, 351 U.S. 1 (1956), in which the Court found that the federal policy of protecting Indian land was sufficiently strong to defeat a competing federal revenue interest.

CONCLUSION

Indians occupy a unique, but in some respects unenviable, status in American society. They were the first Americans, but they are the poorest of poor Americans. They remain, after over 200 years in this society, in dire need of education, jobs, housing, health care and other services and opportunities which most Americans take for granted. Economic deprivation is the most serious of Indian problems. Recognizing that "it is critically important that the Federal government support and encourage efforts which help Indians develop their own economic infrastructure", President Nixon has recommended that Congress increase the revolving loan fund for Indian economic development from $25 million to $75 million and provide an additional $200 million federal guarantee and insurance program for such development. *Indian Affairs, The President's Message to the Congress,* 6 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 894, 900-01 (1970).

For over 150 years this Court has vigorously guarded and defended the right of Indian tribes to be free from state incursion upon matters which touch peripherally, not to say the very heart of, tribal sovereignty. At the same time, the Court has continuously upheld the power of the federal government to be free from state limitations in fashioning its policy for the regulation of Indian affairs. Self-help, self-determination, and Indian economic development presented in this case reflect the nucleus of current federal and Indian interests. These interests must not be subordinated by any court to the general revenue-raising interests of a state. Above all, this Court must not permit these interests to stand or fall without comment by the institution to which history has committed their protection and promotion.

By reason of the foregoing, we respectfully submit that this petition for writ of certiorari should be granted and that the judgment of the New Mexico Court be reversed.

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